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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

PETE WILSON, et al.,
Petitioners,

vs.

JOHN ARMSTRONG, et al.,
Respondents.

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

DERRICK CLARK, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS IN CALIFORNIA VS. CLARK

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Respondents respectfully request that the Court deny the petition for certiorari seeking review of the Ninth Circuit's decision in Clark v. California, 123 F.3d 1267 (9th Cir. 1997), reprinted at Appendix 46a-55a.

STATEMENT OF THE CASE

This is a class action filed on behalf of developmentally disabled prisoners confined in California correctional facilities. The plaintiffs seek injunctive and declaratory relief to remedy disability discrimination they have suffered during their confinement. The defendants--petitioners in this Court--are the State of California, the California Department of Corrections ("CDC"), and certain California officials responsible for operating the prisons in which plaintiffs are confined.[1] This case is before the Court on petitioners' interlocutory appeal from an order denying their motion to dismiss the complaint.

A. Discrimination against the developmentally disabled in California prisons.

More than 2,500 prisoners under the control of CDC have developmental disabilities, which are disabilities such as mental retardation, cerebral palsy, autism, and other similar disabling conditions that are not solely physical in nature.[2] These prisoners have low IQs, and have difficulty learning and understanding basic skills such as reading and writing. Due to their disabilities, plaintiffs have a difficult time functioning in the prison system. They are more likely than non-disabled prisoners to be mistreated, and are often the victims of sexual, physical and mental abuse. They are less likely to comprehend and therefore to comply with CDC

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[1] Although omitted from petitioners' list of parties, the United States intervened as a party before the Ninth Circuit to defend the constitutionality of the statutes. 28 U.S.C. § 2403(a).

[2] The facts stated here are found in plaintiffs' complaint, the allegations of which are required to be taken as true on petitioners' motion to dismiss.

written rules and regulations. As a result, plaintiffs are frequently subject to disciplinary actions, which may adversely affect their release dates.

Although petitioners have known for a number of years that, conservatively, two to three percent of the prison population suffers from these disabilities, they have aggravated the difficulties these prisoners face by discriminating against them because of their disability. Among other things, petitioners have (1) denied the prisoners the opportunity to participate in the full range of educational and vocational programs available to non-disabled prisoners, (2) failed to make reasonable modifications to those programs to make them accessible to disabled prisoners; (3) failed to provide the prisoners appropriate housing and adequate medical and mental health care; and (4) failed to take reasonable steps to ensure that the prisoners sufficiently understand prison rules and due process proceedings.

B. Plaintiffs' claims and the relevant statutory provisions.

Plaintiffs assert claims under section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133, and 42 U.S.C. § 1983 for denial of plaintiffs' constitutional rights under the Eighth and Fourteenth Amendments. The State of California and the CDC are named as defendants only on the claim under the Rehabilitation Act (which claim, as discussed below, is concededly not subject to any Eleventh Amendment bar because of the state's waiver of immunity). All other claims are asserted only against individual state officials.

1. The Rehabilitation Act.

Congress passed the Rehabilitation Act, 29 U.S.C. §§ 701-797, in 1974 to combat discrimination against the disabled. Congress explicitly found that:

> individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services.

29 U.S.C. § 701(a)(5) (emphasis added). Accordingly, one of the Act's purposes is to maximize the "inclusion and integration into society" of individuals with disabilities through "the guaranty of equal opportunity." Id. § 701(b)(1)(F) (emphasis added).

Section 504 of the Rehabilitation Act provides that no "qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A "qualified individual with a disability" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Id. § 706(8)(B). "Program or activity" is defined as "all operations" of "a department, agency, special purpose district, or other instrumentality of a State or of a local government." Id. § 794(b)(1)(A) (emphasis added).

In response to this Court's decision in Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), which held that Congress had not clearly expressed its intent in the Rehabilitation Act to abrogate the states' Eleventh Amendment immunity, Congress enacted 42 U.S.C. § 2000d-7, expressly abrogating Eleventh Amendment immunity for all states that accept financial assistance under the Rehabilitation Act and other anti-discrimination statutes.

2. The Americans with Disabilities Act.

In 1990, Congress passed the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA"). In doing so, Congress found:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> . . . .
>
> (4) individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
>
> . . . .
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;
>
> (8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . .

> (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . .

Id. § 12101(a). In enacting the ADA, Congress invoked "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." Id. § 12101(b)(4) (emphasis added).

The substantive provisions of the ADA are similar to those of the Rehabilitation Act. Section 202 of the ADA provides that

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The ADA definition of a disability is nearly identical to that of the Rehabilitation Act: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." Id. § 12102. Under the ADA, a "qualified individual with a disability" is defined as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in

> programs or activities provided by a public entity.

Id. § 12131(2). A "public entity" under the ADA is defined, in part, as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." Id. § 12131(1)(B).

Congress expressly abrogated the states' Eleventh Amendment immunity as to suits under the ADA. 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

C. Rulings below.

Petitioners moved to dismiss this suit on the grounds, among others, that the Rehabilitation Act and the ADA do not apply to state prisons and that suit is in any event barred by the Eleventh Amendment. The district court rejected both arguments. Pet. App. at 67a-68a. Petitioners filed an interlocutory appeal from the denial of their Eleventh Amendment immunity claim. See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993). Petitioners also sought discretionary interlocutory review of the court's ruling on the statutory coverage issue under 28 U.S.C. § 1292(b), but the Ninth Circuit denied their application on that issue.

The Ninth Circuit affirmed the district court's ruling that the Eleventh Amendment does not bar this suit for declaratory and injunctive relief. Pet. App. at 55a. The court rested its decision on three independent grounds. First, the court relied on Congress' unequivocal, express abrogation of the states' immunity contained in both the Rehabilitation Act and the ADA. Applying this Court's decision in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), the court concluded that this abrogation is effective because Congress validly enacted the anti-discrimination provisions of both

statutes pursuant to its power under section 5 of the Fourteenth Amendment. Pet. App. at 51a.

Second, the court ruled that plaintiffs' claims under the Rehabilitation Act are not barred because California waived any immunity when it accepted federal funds under that statute. Pet. App. at 55a. As noted above, the Rehabilitation Act expressly conditions receipt of such funds upon a waiver of Eleventh Amendment immunity. 42 U.S.C. § 2000d-7.

Third, the court ruled that plaintiffs' claims under both statutes could go forward against the named state officials under the doctrine of Ex parte Young, 209 U.S. 123 (1908). Pet. App. at 55a. It was undisputed below that plaintiffs are seeking only prospective declaratory and injunctive relief.

On the same day it issued its opinion in this case, the Ninth Circuit also issued its opinion in Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997). Pet. App. at 1a. Armstrong was brought by a class of California prisoners with certain physical and learning disabilities, asserting claims under the Rehabilitation Act and the ADA. Following denial of the defendants' motion for summary judgment and the entry of a stipulated injunctive order, the Armstrong defendants appealed under 28 U.S.C. § 1292(a)(1). Because the appeal in Armstrong was taken under section 1292(a)(1), it was not limited--as was the appeal in this case--to the Eleventh Amendment immunity issue, but also extended to the question whether the statutes apply to state prisons. Accordingly, although petitioners have filed a joint petition from both cases, the statutory coverage issue that forms the basis for petitioners' first question presented was an issue

only in Armstrong. The ruling below in this case was limited to the Eleventh Amendment issues.[3]

REASONS FOR DENYING THE WRIT

There is no reason for the Court to grant certiorari because this case does not involve a conflict among the circuits, a conflict with decisions of this Court, nor an important question of law. The only issue here was whether petitioners are immune from suit under the Eleventh Amendment, and the Ninth Circuit answered that question in the negative for three separate and independent reasons. In doing so, the court followed well-established principles of law, and applied them in a straightforward and unexceptional manner. Petitioners do not claim there is any conflict among the circuits on the two questions presented in this case. Indeed, on the abrogation issue presented by petitioners' second question, the only other circuit to address the issue has reached the same result the Ninth Circuit reached here. Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997). And on the Ex parte Young issue presented by petitioners' third question, no court that we are aware of has even considered--much less accepted--petitioners' novel assertion that Ex parte Young does not apply to a suit seeking to prospectively enjoin state prison officials from violating federal anti-discrimination statutes.

Moreover, petitioners attack only two of the three grounds for the court of appeals' decision: that Congress abrogated the states' immunity under section 5 of the Fourteenth Amendment, and that the suit may in any event go forward against the state officials under the Ex parte Young doctrine. Petitioners do not contest the Ninth Circuit's third

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[3] For this reason, plaintiffs do not address petitioners' first question presented, except to state that certiorari should be denied as to that question for the reasons stated in the brief in opposition filed by the Armstrong respondents.

ground for finding no Eleventh Amendment immunity: express waiver under the Rehabilitation Act. Thus, plaintiffs' claim under the Rehabilitation Act (which, insofar as this case is concerned, provides relief essentially co-extensive with plaintiffs' ADA claim) will not be barred by the Eleventh Amendment even if this Court were to grant the petition and reverse as to each of the questions presented in this case. Under these circumstances, there is no occasion for the exercise of this Court's discretionary jurisdiction.

I. CERTIORARI IS INAPPROPRIATE BECAUSE THE RULING BELOW IS INDEPENDENTLY SUSTAINABLE ON MULTIPLE GROUNDS, ONE OF WHICH PETITIONERS DO NOT CHALLENGE.

Petitioners do not dispute that plaintiffs' claim under the Rehabilitation Act is not barred by the Eleventh Amendment, regardless of any resolution the Court might make as to the two questions presented. Certiorari should be denied for this reason alone.

The Rehabilitation Act contains an express waiver of Eleventh Amendment immunity conditioned upon a state's acceptance of federal funds. See 42 U.S.C. § 2000d-7 (amending the Rehabilitation Act). This Court has recognized this section as "an unambiguous waiver of the States' Eleventh Amendment immunity." Lane v. Pena, 116 S. Ct. 2092, 2100 (1996). Accordingly, the Ninth Circuit held below that "[b]ecause California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment." Pet. App. at 55a.

Petitioners have not attacked this holding of the Ninth Circuit, nor is there any legitimate basis to do so. Thus, as to the Rehabilitation Act, the questions presented are entirely academic. Even if Congress did not validly abrogate the states' immunity under its Fourteenth Amendment powers, and even if Ex parte Young did not apply here, plaintiffs'

Rehabilitation Act claim will go forward because of the state's waiver.

Moreover, the undisputed lack of immunity from the Rehabilitation Act claims also renders essentially academic the questions presented as to the ADA. Although plaintiffs have asserted claims under both the Rehabilitation Act and the ADA, the relevant rights and remedies under those statutes are essentially co-extensive. Section 504 of the Rehabilitation Act prohibits discrimination against disabled persons in connection with "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Section 202 of the ADA extends this prohibition to public entities generally, without regard to whether they receive federal aid. 42 U.S.C. § 12132. The ADA provides that the regulations enforcing this prohibition are to be consistent with those promulgated under the Rehabilitation Act (id. § 12134(b)), and it adopts the enforcement remedies, procedures and rights of the Rehabilitation Act. Id. § 12133. Thus, the lower courts have uniformly recognized the basic similarity of the two statutes as they relate to public entities. See Hoekstra v. Independent Sch. Dist., 103 F.3d 624, 626-27 (8th Cir. 1996), cert. denied, 117 S. Ct. 1852 (1997); Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1264-65 n.9 (4th Cir. 1995).

Because the only significant difference between the two statutes as they relate to public entities is that the ADA applies to programs and entities that do not receive federal aid, the Eleventh Amendment questions presented here would have practical significance only in a case involving a state governmental defendant that has not received federal aid. Only in that situation would the waiver under the Rehabilitation Act not be dispositive and there be any practical reason to determine whether the Eleventh Amendment bars a suit under the ADA. That, however, is not this case. Here, the state concededly receives federal aid and is subject to suit for the same basic remedies, regardless of the ADA and regard-

less of the Eleventh Amendment issues presented by the petition. There is accordingly no reason to grant certiorari.

Even apart from waiver under the Rehabilitation Act, the existence of two other alternative grounds for the decision below also counsels against a grant of certiorari. As discussed in the following sections, both of these alternative rulings are firmly grounded in existing law. If the Court were to grant certiorari at this time, and later conclude that the Ninth Circuit was correct as to either one of the grounds, the issue as to other ground would be mooted. Thus, even if the questions were otherwise worthy of certiorari (which we deny for the reasons discussed below), review should not be granted here, but should be reserved for a case in which the issue is squarely presented and must necessarily be resolved.

Of particular importance in this regard is the alternative Ex parte Young ground. The Ninth Circuit's application of that longstanding doctrine to permit plaintiffs' claims for prospective relief was plainly correct. And, because the state entities were named as defendants only on the Rehabilitation Act claim (as to which the state has concededly waived any immunity), Ex parte Young is completely dispositive of the immunity claims raised in the petition. The availability of this well-established, independent ground for decision makes it unnecessary and inappropriate for the Court to consider whether Congress validly abrogated the states' immunity by exercising its Fourteenth Amendment powers.

II. THE NINTH CIRCUIT'S DECISION DOES NOT IN ANY EVENT RAISE ANY QUESTION ON WHICH THERE IS ANY CONFLICT OR THAT OTHERWISE SUPPORTS CERTIORARI.

Even if resolution of the questions presented would have some practical consequence in this case, certiorari would still be inappropriate. The Ninth Circuit's rulings on the

application of Ex parte Young and the abrogation issue were each solidly grounded in existing law on which there is no conflict among the circuits.

A. The Ninth Circuit's application of *Ex parte Young* was plainly correct and independently supports the judgment.

Petitioners' assertion that the Ninth Circuit's application of Ex parte Young raises "important unsettled issues" (Pet. at 14) rests entirely on this Court's decision in Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997). Petitioners assert that under Couer d'Alene their interest in prison management is sufficient to mandate an exception to the longstanding rule of Ex parte Young that the Eleventh Amendment does not bar suit against state officials to prospectively enjoin an ongoing violation of federal law.

Couer d'Alene, however, does not assist petitioners. First, the holding there was that the Indian tribe's suit was barred because it was the "functional equivalent of a quiet title action" in which the state would be divested of "substantially all benefits of ownership and control" over sovereign lands, including the power even to exercise regulatory jurisdiction over the land. 117 S. Ct. at 2040. This ruling has no implications for this case, which seeks no such relief, but instead seeks only to obtain prospective injunctive relief to prevent state officials from violating federal law by discriminating against disabled prisoners.

Second, a majority of the Court in Coeur d'Alene rejected the very approach petitioners now urge. Petitioners assert that application of Ex parte Young should turn on whether, in a given case, the state's asserted interest in being free of federal regulation is sufficiently strong to outweigh the federal interest in enforcement of its law. Pet. at 13. The majority of the Court, however, rejected such "a case-by-case balancing approach to the Young doctrine." 117 S. Ct. at 2047 (O'Connor, J., concurring); 117 S. Ct. at 2048 (Souter,

J., dissenting). The majority instead reiterated that the governing standard is a "straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 117 S. Ct. at 2047 (O'Connor, J., concurring). Petitioners do not dispute that the claims in this case satisfy this standard.

Third, even if the Court were to consider the adoption of a case-by-case balancing approach, the result in this case would not change. Plaintiffs' claims here to enjoin an ongoing violation of federal law fall squarely within the well-established and accepted understanding of Ex parte Young. Petitioners cite no authority holding, or even suggesting, that a state's asserted interest in managing its prisoners should immunize its officials from suit in federal court seeking only prospective relief to vindicate federal rights. To the contrary, the courts have consistently followed Ex parte Young in cases involving prisoners.[4] Nor is the state's asserted interest here meaningfully different from that in other cases in which Ex parte Young has routinely been applied. See, e.g., Papasan v. Allain, 478 U.S. 265 (1986) (local public education).

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[4] See Alabama v. Pugh, 438 U.S. 781, 782 (1978) (where inmates sued both state and individual prison officials, only the state itself was immune under the Eleventh Amendment); Thompson v. Enomoto, 915 F.2d 1383, 1390 (9th Cir. 1990), cert. denied, 502 U.S. 1071 (1992) (refusing to vacate consent decree on Eleventh Amendment immunity grounds because action by inmates "was against state officials, not the state"); Duran v. Carruthers, 885 F.2d 1485, 1489 (10th Cir. 1989), cert. denied, 493 U.S. 1056 (1990) (in inmate class action suit seeking injunctive relief under federal statutes and Constitution, court stated that "the defendants [state officials] under the [E]leventh [A]mendment are not immune"); Wolfel v. Morris, 972 F.2d 712, 718-19 (6th Cir. 1992) (affirming summary judgment ruling that state officials were not immune from suit).

Finally, petitioners' assertion that this suit would "intrude extensively" upon their interests and "usurp[] an essential area of state sovereignty" (Pet. at 13, 14) is at this point wholly speculative. Petitioners appealed from an order denying their motion to dismiss. No proceedings on the merits of any claim for relief have yet occurred, and no relief has been ordered. Nor do the statutes (or their implementing regulations) on their face impose any undue interference. To the contrary, they allow sufficient room for legitimate needs of prison administration. See, e.g., 28 C.F.R. § 35.130(b)(7) (modification of program not required if it would "fundamentally alter the nature of the service, program or activity"); Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994) (denying relief under the Rehabilitation Act against prison officials because officials had shown a reasonable threat to security). Thus, even assuming that a state's alleged sovereign interest in being free from federal suit to enforce federal law in cases such as this would ever be adequate to justify an exception to Ex parte Young, it cannot do so here where no relief has yet been ordered and the statutes at issue leave room for the recognition of important state interests.

In short, there is no reason for this Court to grant certiorari on the Ex parte Young issue. The Ninth Circuit's ruling faithfully adhered to settled law. No decision of this Court or any other court that we are aware of has reached a conflicting result. And, as noted above, Ex parte Young (in combination with the state's waiver under the Rehabilitation Act) is fully dispositive of the petitioners' Eleventh Amendment claims, thus providing an independent basis for denying the certiorari petition in its entirety.

B. The Ninth Circuit correctly ruled that the anti-discrimination provisions of the Rehabilitation Act and the ADA were validly enacted pursuant to the Fourteenth Amendment.

The Ninth Circuit also correctly applied settled law in ruling that Congress validly abrogated the state's Eleventh Amendment immunity. Petitioners do not cite any decision of this Court or of the courts of appeals reaching a contrary result. To the contrary, it appears that only the Seventh Circuit has specifically considered whether the Rehabilitation Act and the ADA are valid Fourteenth Amendment enactments, and it reached the same result as the opinion below. Crawford, 115 F.3d at 487 (Congress properly abrogated immunity, because the Acts are appropriate legislation enacted pursuant to Congress' powers under the Fourteenth Amendment).

As this Court reaffirmed in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), Congress may abrogate immunity when it has "unequivocally expressed its intent" to do so and when it has "acted pursuant to a valid exercise of power," such as section 5 of the Fourteenth Amendment. Id. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)); see also Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Petitioners do not dispute that Congress "unequivocally expressed its intent" to abrogate the states' immunity in both the Rehabilitation Act and the ADA. See Pet. at 9; see 42 U.S.C. § 12202 (ADA); 42 U.S.C. § 2000d-7(a)(1) (Rehabilitation Act). Nor do they appear to question that Congress intended to enact the statutes pursuant to its power to enforce the Fourteenth Amendment. As the court below recognized (Pet. App. at 54a), Congress expressly announced in enacting the ADA that it was acting pursuant to its Fourteenth Amendment powers. 42 U.S.C. § 12101(b)(4). And

the courts have uniformly recognized that Congress similarly intended to exercise those powers in enacting the Rehabilitation Act. Cf. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 244-45 n.4 (1985) (noting without deciding that the Rehabilitation Act was passed pursuant to the Fourteenth Amendment); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 n.2 (1987) ("[t]he Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment," citing Atascadero); Crawford, 115 F.3d at 487.

Thus, the only disputed issue is whether Congress' exercise of its Fourteenth Amendment power was "valid." On this issue as well, however, the governing law is settled and the Ninth Circuit's application of that law unremarkable. As this Court has recognized:

> § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). Because Congress "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution" (City of Boerne v. Flores, 117 S. Ct. 2157, 2171 (1997)), its conclusions as to the appropriate scope of legislation under the Fourteenth Amendment "are entitled to much deference." Id. at 2172.

The Ninth Circuit properly ruled that the Rehabilitation Act and the ADA meet this standard. In both instances, Congress passed the legislation to prohibit discrimination against the disabled, based upon express findings that persons with disabilities have suffered discrimination. See 42 U.S.C. § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities"); 29 U.S.C. § 701(a)(5) ("individuals with disabilities continually encounter various forms of discrimination"). These findings

were plainly within Congress' power to make, and are a proper basis for Congress to act pursuant to the Fourteenth Amendment. Indeed, this Court has itself invoked the protections of the Fourteenth Amendment to invalidate unlawful discrimination against the disabled, and in doing so recognized that

> there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms.

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985); see also Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985) ("To be sure, well-cataloged instances of invidious discrimination against the handicapped do exist."). Congress' power to remedy such discrimination under section 5 of Fourteenth Amendment cannot seriously be questioned.

Petitioners assert that the Rehabilitation Act and the ADA could not have been enacted pursuant to the Fourteenth Amendment because this Court held in Cleburne that classifications based on disability are not "suspect" and thus not subject to heightened scrutiny. Pet. at 11-12. But petitioners cite no authority supporting the notion that the Equal Protection clause--much less Congress' power to enforce that clause--is limited to suspect classifications. Indeed, Cleburne itself refutes any such suggestion, as it struck down the classification at issue there as violating the Equal Protection clause. 473 U.S. at 447-50. Congress enjoys no less power under the broad remedial authority of section 5 of the Fourteenth Amendment.[5]

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[5] Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir. 1996), cited by petitioners (Pet. at 11), did not reach a contrary result. That case held only that the general wage and hour provisions of Fair

(continued...)

The Ninth Circuit also correctly concluded that the Rehabilitation Act and the ADA "evidence a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Pet. App. at 53a (citing City of Boerne, 117 S. Ct. at 2169). This is not a situation, like that addressed in City of Boerne, in which Congress has attempted "to make a substantive change in the governing law" by redefining "what constitutes a constitutional violation." 117 S. Ct. at 2164. Rather, in both statutes, Congress has simply enforced the Fourteenth Amendment itself, by prohibiting discrimination against the disabled and requiring reasonable steps to remedy and eliminate the effects of such discrimination.

As the Ninth Circuit recognized, these provisions are well within Congress' power to enforce the Fourteenth Amendment through "appropriate legislation." Indeed, as anti-discrimination statutes founded upon extensive legislative findings of unjustified isolation of and discrimination against disabled persons, the Rehabilitation Act and ADA lie at the core of the rights guaranteed by the Fourteenth Amendment. City of Boerne, 117 S. Ct. at 2166, 2169 (Fourteenth Amendment legislation must be judged against "historical experience" and the "legislative record" on which it is based). Moreover, as this Court just recently reaffirmed, legislation that

> deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits

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[5](...continued)
Labor Standards Act were not enacted pursuant to the Fourteenth Amendment. The court specifically declined to address the situation presented here, where Congress has enacted legislation to protect a specific group of people it has found to have been subjected to invidious discrimination. Id. at 210 n.4.

> conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States."

City of Boerne, 117 S. Ct. at 2163 (quoting Fitzpatrick, 427 U.S. at 455); Katzenbach, 384 U.S. at 653 (it is for Congress "to assess and weigh the various conflicting considerations" including "the risk or pervasiveness of the discrimination" and "the adequacy or availability of alternative remedies").

Finally, for all of the foregoing reasons, the Rehabilitation Act and the ADA are "not prohibited by but [are] fully consistent with the letter and spirit of the Constitution." See Katzenbach, 384 U.S. at 651. Petitioners' only argument to the contrary is that the statutes purportedly interfere with the states' "sovereign interest in managing their convicted felons." Pet. at 13. But nothing in the Constitution protects the states from the application of federal laws designed to protect the constitutional rights of prison inmates. Moreover, as discussed above (supra, p. 14), any claim of improper interference is on the present record entirely speculative because no specific relief has yet been sought or ordered.

Thus, as with its other rulings, the Ninth Circuit's ruling on the abrogation issue was fully in accord with this Court's decisions and the decisions of other courts of appeal. There is no reason to grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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